STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

Appeal No. 2023AP1140

State of Wisconsin ex rel. Wisconsin Department of Corrections, Division of Community Corrections,

Petitioner-Respondent,

v.

Brian Hayes, Administrator, Division of Hearings and Appeals,

Respondent-Appellant,

Keyo Sellers,

Intervenor-Co-Appellant

On Appeal From a Decision and Order in the Milwaukee County Circuit Court,
The Honorable Thomas J. McAdams, Presiding
Milwaukee County Case No. 22CV4878

REPLY BRIEF OF INTERVENOR-CO-APPELLANT KEYO SELLERS

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Mr. Sellers agrees entirely with the brief of Appellant Hayes. In this brief, in order to avoid duplicative argument as far as possible, he intends merely to expand on certain points and add additional perspective.

The reply brief filed by the Petitioner-Respondent Department of Corrections ("DOC") in general misunderstands the law governing review of agency actions and inappropriately analogizes the procedure for agency decision making with criminal trials and appeals. The DOC does not argue that DHA erred in not finding 'good cause' for excusing K.A.B. from testifying and fails to convincingly demonstrate, to the high standard required by law, that factual determinations made by DHA were unreachable by any other reasonable fact-finder. Accordingly, the Court should reverse the circuit court's grant of certiorari and affirm DHA's decision regarding Keyo Sellers in its entirety.

A. Mr. Sellers did not forfeit his right to Due Process.

The claim that Sellers lost the right to confront his accuser by not raising it to the ALJ or in his administrative appeal is an example of the DOC's confused reasoning in this case. The DOC over-analogizes the intra-agency process by which the Administrator of DHA is asked, by either party, to review a hearing decision to circuit court trial and appellate procedure. A request for an administrative appeal in a revocation case is simply not the same as a criminal trial and appeal, because neither the courts nor the legislature have made it so.

The Wisconsin Rules of Evidence do no apply to revocation hearings. Wis. Stat. § 911.01(4); Wis. Admin. Code § HA 2.05(6)(e). Revocation hearings are administrative civil proceedings, not criminal proceedings, *State ex rel. Cramer v. Schwarz*, 2000 WI 86, ¶ 28, 236 Wis.2d 473, 613 N .W.2d 591; Wis. Admin. Code Ch. HA 2. Forfeiture in a criminal context is a complicated area of law, often

dependent on the peculiarities of the facts.[1] The DOC cites only criminal cases in arguing for forfeiture for the very good reason that courts have not applied that rule to administrative appeals in revocation cases.

Because of the relaxed procedure in revocation matters permitted by *Morrissey v. Brewer,* 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), it may fall upon the agency to proactively ensure due process is guaranteed in revocation proceedings. No court that we're aware of has ever absolved DHA of that duty. *Morrissey* ennumerated a non-exhustive list of the minimal elements of due process that were required in a revocation hearing. They include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reason for revoking parole.

Morrissey, 408 U.S. at 488-89. While there is certainly a chance that a violation of any of these elements of due process will be overlooked if not raised by the defendant, we are unaware of any authority that states a defendant loses the right if not raised in the same way as is required in a criminal trial. In *State ex rel. Simpson v. Schwarz*, 2000 WI App 235, 239 Wis.2d 443, 620 N.W.2d 414, the obligation to guarantee the right to confrontation appears to rest firmly on the agency. There is no indication in the court's recitation of the facts that Simpson ever raised confrontation before his certiorari filing. See Id. at ¶¶ 3-9. In response to the state's argument that the ALJ's obligation to find good cause disappears if the hearsay is reliable, the court concludes,

[1] The case relied upon by the DOC for this claim, *State v. Counihan*, 2020 WI 12, 390 Wis. 2d 172, 938 N.W.2d 530 (See Br. of Pet'r-Resp't at 27) ultimately found in favor of the defendant, that there was no forfeiture, due to the specific circumstances of the criminal case.

> We cannot agree…that the requirement to find good cause ever simply 'vanishes'. …[R]egardless whether the reliability of evidence can be a basis for a finding of good cause …, an ALJ may not avoid making such a finding whenever he or she determines that the evidence is reliable. We therefore agree with Simpson that the ALJ erred by failing to comply with *Morrissey*.

Id. at ¶ 15. The agency appears to be responsible for guaranteeing that element of due process whether raised by the supervisee at his hearing or not.

That having been said, the best answer to the DOC's forfeiture claim is possibly simpler. Sellers did not claim a violation of his right to confrontation on appeal (certiorari, in this case) after failing to make that claim before the agency. Mr. Sellers did not seek a writ of certiorari. DHA, in its internal deliberations (in this case at the administrative review stage), identified *sua sponte* a due process defect and acted on it appropriately.

The DOC's claim in fact appears to be that, if the subject of a revocation hearing fails to state his due process right on the record, the agency is then prohibited from enforcing that right. The DOC offers no authority for that position as it is not, and never has been, an accurate statement of revocation procedure in Wisconsin.

Finally, the DOC was not prejudiced by Seller's alleged failure to raise the issue himself. The DOC at the initial hearing, being well aware of *Simpson* and *Morrissey*, had every opportunity to produce K.A.B. to testify. The agent was also given an opportunity at the hearing to explain any difficulty or unreasonable expense the Department may have encountered in obtaining K.A.B.'s live testimony. (See R. 8:130). Mr. Sellers has a right to confront and cross-examine his accuser and DHA acted appropriately in finding that right had been violated and that allegations 1-4 could not be proven without affording Sellers an opportunity to cross-examine.

B. The DOC misstates the standard of review, suggesting that this Court should reverse the agency if any evidence would support revocation.

Section I, subsection A, of the DOC's argument that the agency committed reversible error is entitled, "The evidentiary burden for revocation is low and, if substantial evidence supported the revocation decision, it must be upheld". (Br. of Pet'r-Resp't at 20). The DOC appears to argue that either 1) if any substantial evidence supports a probationer's revocation, this court must so find, whether that means affirming or, as in this case, reversing the agency's decision; or 2) that the administrator is required to affirm the ALJ's decision if there is any substantial evidence that supports revocation. Both statements are false.

The substantial evidence test, well cited by the DOC, requires this Court to leave the agency's final determination in place if there is any substantial evidence that would support it. See *State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580, 585–86, 326 N.W.2d 768 (1982) and "Br. Pet'r-Resp't" at 20. The decision that is reviewed by this Court is the final decision of the agency, the administrator's decision, and not the decision of the ALJ. See *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶7, 242 Wis.2d 94. 624 N.W.2d 130, *State ex rel. Braun v. Krenke*, 146 Wis.2d 31, 39, 429 N.W.2d 114 (Ct. App. 1988) ("Certiorari lies only to review a final agency determination.").

Administrator Hayes is not, as the DOC argues, required to defer to the ALJ if there is substantial evidence that would support revocation. Quite the opposite, the DHA administrator is authorized by law to review hearing decisions within his agency *de novo*. See Wis. Admin. Code § HA 2.05(9). In his decision, Hayes stated specifically that he was undertaking a *de novo* review of Mr. Sellers' hearing, citing for that authority *State ex rel. Foshey v. Department of Health & Social Services*, 102 Wis. 2d 505, 516 (Wis. Ct. App. 1981). (See R. 8:72).

Given the DOC's misapplication of standards in its brief, it is difficult at points to understand the argument being made. We assume they argue that Hayes'

determination, that allegations 1-4 are not conclusively proven without the testimony of K.A.B, could not be reached by any reasonable person.[2] We disagree. The DHA concluded that, absent testimony of K.A.B. and an opportunity to cross-examine (as required by *Simpson* and *Morrissey*), it cannot be established that a sexual assault or a trespass even occurred. (See R. 8:72). K.A.B. is the only one who can tell this part of the story. That is at least one reasonable view of the evidence and facts presented in Sellers' case and, so, the administrator's decision may not be disturbed.

> When a court on certiorari considers whether the evidence is such that the Department might reasonably have made the order or determination in question, the court is not called upon to weigh the evidence; certiorari is not a *de novo* review. … A certiorari court may not substitute its view of the evidence for that of the Department.

Van Ermen v. Department of Health & Social Services, 84 Wis. 2d 57, 64 (Wis. 1978).

The DOC makes no argument that DHA was wrong on due process or that there was, in fact, 'good cause' for excusing K.A.B. from testifying in person via video link.

The Department asserts, "DHA's decision ignored the video evidence and Agent Kellen's identification, neither of which was hearsay evidence. DHA subverted the 'substantial evidence' by ignoring key non-hearsay evidence." (Br. Pet'r-Resp't at 24) (Citation omitted). Again, the DOC confuses the 'substantial evidence' standard. Administrator Hayes is not limited in his review of ALJ decisions by a 'substantial evidence' test, he reviews hearing decisions *de novo*. See *Foshey*, 102 Wis. 2d at 516. Additionally, the Administrator did not 'ignore' other evidence in the case, he is not required to address every item presented at the

[2] DOC states in its brief, *de facto* in support of Hayes decision, that "[t]he question under the 'substantial evidence test' is 'whether reasonable minds could arrive at the same conclusion [that DHA] reached. 'Substantial evidence' is a 'low burden of proof.' (Br. Pet'r-Resp't at 20). (Citation omitted).

hearing in his written decision. In this case, it appears he stopped his inquiry when he found that, absent K.A.B.'s live testimony, neither a sexual assault nor a trespass could be proven without violating Mr. Sellers' due process rights. That decision followed state and federal law correctly and, insofar as he made factual determinations, they were well founded and certainly conclusions upon which reasonable minds might agree.

That reasonable minds, as the DOC contends, could also prefer the ALJ's view of the case (which we might contest) is irrelevant to this appeal. If the final decision of the agency keeps within its jurisdiction, comports with the law and takes a view of the facts that is not unreasonable, the agency's action must be upheld. See *Foshey*, 102 Wis. 2d 513.

C. The DOC is mistaken as to the nature of the DHA's final decision.

Throughout its brief, DOC appears to interpret DHA's decision as a decision to reverse the ALJ, rather than a decision declining to revoke Mr. Sellers' probation. See, e.g., Br. Pet'r-Resp't at 20, section title ("DHA committed reversible error when it reversed the ALJ's revocation of Sellers's [sic] probation"); id at 28 ("Aside from forfeiture, the principle Sellers and Hayes rely upon does not apply given the basis of ALJ Carlson's decision.").

This Court does not have before it a choice between the ALJ's decision and the administrator's. As stated above, "certiorari lies only to review a final agency decision." *Braun*, 146 Wis. 2d at 39.

As the DOC references the circuit court decision, we note that Judge McAdams also appears to have erred in concluding that he was presented with a choice between the ALJ's decision and Hayes' decision – that Hayes decision was only a reversal of the ALJ and, if Hayes were then reversed, the agency would then be bound by ALJ's Carlson's decision. (See R. 36:42, "The Writ of Certiorari is granted because the DHA decision reversing the ALJ who presided over the hearing misreads the record and was based on substantial errors of law.").

This is incorrect. The DHA decision was a decision not to revoke Mr. Sellers' probation. That decision stands or falls on its own, under the four questions described in *Foshey* and with substantial deference to the agency; it does not stand or fall in comparison to the ALJ's decision.

As the DOC makes no request for remedy, other than that the Administrator's decision be reversed, it apparently assumes that revocation, or a reinstatement of the ALJ's decisions, would be the automatic result. That is also incorrect. Should the DHA decision be reversed because, for example, the Court finds it misapplied a due process rule, it is still for the agency to continue its examination of the evidence where it stopped because of the confrontation problem. DHA is not required to adopt the findings of the ALJ. For purposes of this appeal, the ALJ's decision is irrelevant.

We make this point simply to underline the DOC's inappropriate emphasis on the ALJ's reasoning.

As the DOC has offered no argument as to why 'good cause' should have been found for K.A.B.'s absence from the hearing, and has not shown that DHA's decision is "unreasonable" on the facts, or unreachable by a reasonable mind, but only that it is, in the DOC's opinion, not preferable to the ALJ's decision, we ask the Court to reverse the order of the circuit court and to allow the agency decision to stand.

CONCLUSION

For the reasons stated herein, and in Sellers' initial brief, the Court should reverse the certiorari order of the circuit court and affirm the action taken by the agency.

Respectfully submitted this 30th day of November, 2023.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b), (bm) and (c) for a brief produced in proportional serif font. The length of the brief is 2,334 words.

Dated this 30th day of November, 2023.

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